IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1036

JEAN D. LARSON, Individually and as the Acting Commissioner Of Labor of the Virgin Islands of the United States,

Appellant,

v.

ALFRED ROGERS, RUPERT LESPEARE and RAFAEL LOCKHART, Individually and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States Court of Appeals for the Third Circuit, entered on September 23, 1977, overruling the judgment of the District Court of the Virgin Islands and finding 24 V.I.C. §129 to be invalid under the Supremacy Clause

of the United States Constitution. They submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented. This case involves the question of whether 24 V.I.C. §129, which provides for the replacement of alien nonimmigrant workers in the United States Virgin Islands with United States citizens or permanent resident aliens, is preempted under the Supremacy Clause, Art. VI, Cl. 2, of the Constitution, and the Immigration and Nationality Act (INA), as amended, 8 U.S.C. §1101, *et seq.*

OPINIONS BELOW

The opinion and judgment of the District Court of the Virgin Islands is reported at 411 F. Supp. 128, and is printed in Appendix A hereto. The opinion and judgment of the United States Court of Appeals for the Third Circuit is as yet unreported, and is printed in Appendix B hereto.

JURISDICTION

This suit was brought under Article VI, Cl. 2, of the United States Constitution to enjoin the enforcement of 24 V.I.C. §129. The opinion and judgment of the District Court of the Virgin Islands was entered on the 20th day of February, 1976. Appeal was taken to the United States Court of Appeals for the Third Circuit, and the judgment of that Court was entered on

September 23, 1977. Notice of Appeal was filed in the United States Court of Appeals for the Third Circuit on December 17, 1977. An Application For Extension of Time To Docket Appeal was filed on December 19, 1977. On December 20, 1977, Mr. Justice Brennan entered an Order Extending Time To Docket Appeal to and including January 21, 1978. The jurisdiction of this Court to review this case by appeal is conferred by 28 U.S.C. §1254(2).

QUESTION PRESENTED

Whether the Court of Appeals below misapplied and misconstrued the principles enunciated in *Hines v. Davidowitz*, 312 U.S. 52; *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132; *Goldstein v. California*, 412 U.S. 546; and *De Canas v. Bica*, 424 U.S. 351, in examining both the Federal and local regulatory schemes and then determining that 24 V.I.C. §129(a) of the local regulatory scheme was void under the Supremacy Clause of the United States Constitution by operation of the INA, 8 U.S.C. § 1101(a)(15)(H)(ii), and the regulations promulgated thereunder at 8 C.F.R. Ch. 1.

STATUTES INVOLVED

Section 129(a) of chapter six of Title 24 of the Virgin Islands Code is set forth in Appendix D hereto. Article VI, Clause 2 of the United States Constitution is set forth in Appendix E hereto. 8 U.S.C. §1101(a)(15)(H) is set forth in Appendix F hereto.

STATEMENT

The United States Virgin Islands is a territory of the United States situated east of Puerto Rico in the Carribean. While there are many islands, only three are of any size and substantially populated. These are the islands of St. Thomas, St. Croix and St. John. The total population of the United States Virgin Islands is approximately 100,000, with the bulk of the population being on St. Thomas and St. Croix. The United States Virgin Islands are part of the West Indies, and therefore, in close proximity to many, many other islands, some of which are independent, others being under English, French, or Dutch rule. In recent decades the United States Virgin Islands have exhibited a vigorous economy and, consequently, aliens of various legal classifications have become an integral part of this small territory's economy.

Alfred Rogers and Rupert Lespeare, two nonimmigrant aliens, originally brought this action as a class action in behalf of all alien nonimmigrant workers in the Virgin Islands. They sought to enjoin the enforcement of 24 V.I.C. §129, which provides for the replacement of a nonimmigrant worker whenever a United States citizen or permanent resident alien becomes available for the same position. The basis for this action was the alleged unconstitutionality of 24 V.I.C. §129. In addition, Rogers and Lespeare sought to enjoin the enforcement of a certain form agreement used in connection with employment of temporary alien workers, and the provisions of the Immigration and Nationality Act relating to deportation against them and other persons similarly situated.

At the hearing in District Court on the preliminary injunction, the Court dismissed Lespeare as a plaintiff, but added Rafael Lockhart, the appellant at the Third Circuit level. Without reaching the class action question; the trial court dismissed Rogers as a party to the suit on the same grounds as Lespeare was dismissed, that being a factual finding that neither Rogers nor Lespeare lost their employment through operation of 24 V.I.C. §129. The trial court then denied the motion for a preliminary injunction and dismissed the action – as to the federal defendants on the ground that the sole remaining plaintiff had not stated any claim against them and as to the Virgin Islands' official on the ground that the local statute in question was not unconstitutional on its face or as applied and that the disputed provision of the form agreement was not invalid.

Lespeare, Rogers and Lockhart filed a Notice of Appeal on April 20, 1976. After they filed, the District Court approved their motion for substitution of counsel. Substituted counsel filed no briefs in the Court of Appeals concerning the cases of Lespeare and Rogers. The Third Circuit found that this constituted an abandonment of their appeal. The Third Circuit found that the only issue before it was whether 24 V.I.C. §129(a) is preempted by the INA and the relevant federal regulations.

Lespeare, Rogers and Lockhart were nonimmigrant aliens admitted to the Virgin Islands under the INA, 8 U.S.C. §1101(a)(15)(H)(ii) for temporary employment.

Prior to their entry, a determination had been made, by, or in behalf of, the United States Department of Labor that local workers were not available for the positions which the temporary workers would fill and that the employment of those workers would not adversely affect the wages and working conditions of the domestic workers similarly employed. 8 C.F.R. 214.2(h)(3).

On April 5, 1975, Lockhart was informed by his employer that his position was to be filled by a United States citizen or permanent resident alien, pursuant to 24 V.I.C. Chap. 6, and that his employment would terminate 14 days thereafter. (App. A, p. 5a).

On June 4, 1975, Lockhart moved to intervene in the action brought by Rogers and Lespeare. The Court granted Lockhart's motion, but, as previously stated, dropped Lespeare and later Rogers because neither had lost his job pursuant to 24 V.I.C. §129. While all nonimmigrant aliens (H.2's) filed notices of appeal, only Lockhart was properly before the Third Circuit.

Upon consideration by the United States Court of Appeals for the Third Circuit, that Court overruled the District Court of the Virgin Islands and found that 24 V.I.C. §129(a) was void under the Supremacy Clause of the United States Constitution by operation of the INA and appropriate regulations.

THE QUESTION IS SUBSTANTIAL

There is much in the Third Circuit's Opinion that the Government of the Virgin Islands is in agreement with. In particular we agree that the Third Circuit correctly stated the three grounds upon which a local statute may be deemed preempted by federal law. And we agree with the Third Circuit that this case must be decided upon the ground stated thusly: a local statute will be preempted if it violates the Supremacy Clause by standing "as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67; *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141; *Goldstein v. California*, 412 U.S. 546, 561; *De Canas v. Bica*, 424 U.S. 351, 363.

However, the Government of the Virgin Islands maintains the Third Circuit erred when it found 24 V.I.C. §129(a) to be an obstacle to the accomplishment and execution of the full purposes of the INA, and, therefore, violative of the Supremacy Clause.

The U.S. Virgin Islands has approximately 100,000 persons. Approximately half, or less than half, of that population is in the work force. Over 10,000 of that work force is employed by the Government of the Virgin Islands. The major private enterprise in the U.S. Virgin Islands is tourism. With no natural resources except its climate, and the stability of its Government, tourism is the industry that comes most easily to the islands. In the following argument, the Government will show that 24 V.I.C. §129(a) is not an obstacle to the federal law, but instead brings into focus the federal

law and is firmly in line with the federal purpose, and, therefore, not violative of the Supremacy Clause.

I.

THE THIRD CIRCUIT ERRED IN ITS EXAMINATION OF THE FEDERAL AND LOCAL REGULATORY SCHEMES BY FINDING THAT 24 V.I.C. §129(a) WAS VIOLATIVE OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

The federal law allows H-2 aliens (nonimmigrant aliens coming to the U.S. temporarily to perform temporary services or labor) to come to the U.S. only if *unemployed persons capable of performing the desired labor or service cannot be found* in this country. 8 U.S.C. §1101(a)(15)(H)(ii)(emphasis added). Section 214 of the INA then delegates broad authority to the Attorney General to carry out the intent of the Act. 8 U.S.C. §1184(a). 8 C.F.R. 214(h)(3) then requires that the Secretary of Labor, *or his designated representative*, certify that qualified persons in the United States are not available, and that the employment of the H-2's will not adversely affect the wages and working conditions of the U.S. workers.

24 V.I.C. §129(a) requires the Virgin Islands' Commissioner of Labor to give written notice to the employer whenever he ascertains that there is an occupationally qualified resident worker available to fill the position of a nonresident worker, following which the employer must terminate the employment of the

nonresident worker. There are appropriate enforcement provisions. The V.I. Commissioner of Labor receives this information from the Virgin Islands Employment Service (VIES). At the same time as VIES notifies the V.I. Commissioner of Labor, it must also notify the Immigration Service. 24 V.I.C. §128(d). The local regulatory scheme in 24 V.I.C. Chapter 6 has many other provisions, some protecting nonimmigrant alien workers by requiring certain minimum wages and proper working conditions, and others promoting the interests of U.S. residents over the interests of the nonimmigrant alien worker. Still other provisions require the Commissioner of Labor and VIES to engage in the study and monitoring of labor conditions on the islands.

However, the local regulatory scheme has been found to be generally constitutional. *Gannet Corporation v. Stevens*, 282 F. Supp. 437 (D.V.I. 1968). It is only 24 V.I.C.§129(a) which has been found to be invalid.(App. B, p. 23b). In fact, the Third Circuit had to overrule *Gannet* in order to make its finding. Judge Maris squarely faced the issue of 24 V.I.C. §129(a) and determined it to be constitutional, because it was the *mandate of Congress. Gannet, supra*, 282 F. Supp. at 446.

At the District Court level, the United States Attorney and officials of the Immigration and Naturalization Service stated to the Court that the local statute did not conflict with federal law. (App. A, p.12a). The District Court ruled in favor of the constitutionality of that statute, relying upon *Gannet*. At the Third Circuit level, the Department of Justice attorneys in Washington,

D.C. took over for the federal government and opposed the constitutionality of 24 V.I.C. §129(a). The Third Circuit adopted the analysis of the statutes (federal and local) presented by the Federal government in its *amicus* brief, and found 24 V.I.C. §129(a) unconstitutional. (App. B, p. 13b). It is interesting to note that those involved with the problem of nonimmigrant aliens in the Virgin Islands considered 24 V.I.C. §129(a) to be proper, while their superiors in Washington, D.C. decided it wasn't.

The Third Circuit stated, App. B at p. 22b, that "The federal provisions imply that one of the considerations behind the federal regulations is continuity of the work force." This supposition by the Third Circuit is a foundation to its balancing test of adequate labor force vs. protection of the jobs of citizens. (App. B, p. 21b). We think the correct enunciation of Congressional policy was stated by Judge Maris in *Gannet:*

> "[T]he Congressional policy is that American labor be protected and that temporary workers be admitted only when it tends to serve the national economy, the cultural interests, and the welfare of the United States, by facilitating the entry for temporary residence of aliens whose specialized experience or exceptional ability would best serve the American needs." *Gannet, supra,* 282 F. Supp. at 445.

This same language was cited by the Third Circuit to support its labor force vs. protection of jobs test. But, we maintain, the language of Judge Maris was misconstrued and misapplied by the Third Circuit. To repeat a definition in 8 U.S.C. §1101(a)(15)(H)(ii), an H-2 alien can only come to the United States if

unemployed residents cannot be found to do the job. The Third Circuit impermissibly broadens the scope of the federal statutes by applying this "adequacy of labor force" concept. Congress simply states that if there aren't U.S. residents available to do the job, then H-2 nonimmigrant aliens may be brought in temporarily to do temporary work. This legislation does not guarantee the nonimmigrant aliens any specific time, as the Third Circuit decision now does. The language used by the Third Circuit expands the INA to the point of granting a new right to nonimmigrant aliens, the right of staying in the United States for a year, no matter what the local economy. 8 C.F.R. §214.2(h)(7) allows the H-2 alien to stay in the United States up to the expiration date of the labor certification, or up to a year, if there is no expiration date posted. The common thing is to not post an expiration date. Consequently, the nonimmigrant alien now has a right to be in the United States for a year, no matter what the local economy, unless he is discharged by his employer. The federal regulations, formerly deadlines, now have become something akin to "vested rights." The H-2 has all the benefit of the protection of the Virgin Islands labor laws, applicable federal labor laws, and now with the Third Circuit's decision, a guaranteed period of time in the U.S. Yet the Congressional policy is supposed to be that the entrance of the H-2's not harm the wages and working conditions of United States workers.

It seems probable that the immigration policies of the United States offended the sense of justice of the Third Circuit. Certainly to allow temporary workers into the U.S. when you need them, and send them home when you don't, seems somehow off-center. But

certainly no one can doubt that should the United States ever allow everyone into the United States that would like to come, the economy of the U.S. would be inundated and the standard of living for all United States citizens would suffer.

The Court of Appeals stated, App. B at p. 22b, that the federal regulations provide aliens with an incentive to come to the United States; that being the knowledge they will be able to work until the expiration of the certification or for a period of at least one year. We submit that this incentive did not exist until the Third Circuit's decision in the instant case. The incentive to come to the United States has been and is the availability of good paying jobs with good working conditions. That incentive was there when Congress enacted the INA, and for the Third Circuit to add another is impermissible.

In *De Canas v. Bica, supra,* California sought to strengthen its economy by adopting federal standards in imposing sanctions against employers who knowingly employed aliens who had no federal right to employment. There is nothing different in this present case. 24 V.I.C. §129(a) requires the Commissioner of Labor to replace nonimmigrant alien workers with U.S. residents should they become available. The federal law only allows nonimmigrant aliens in if U.S. residents are unavailable for the jobs in question. There is no frustration of purpose by 24 V.I.C. §129(a). It is nothing more than the federal laws.

A final, but extremely important point must be made. The U.S. Virgin Islands is a territory, not a state. As such, Section 8(c) of the Revised Organic Act of 1954, 48 U.S.C. § 1574(c), reserves to Congress the

power to annul *any* territorial law it decides is impinging uopn its authority. *Gannet* was decided in 1968, and there has been no such annulment by Congress. What is Congressional intent? We think it clear on the face of the statutes, *Gannet*, and *De Canas*, but if Congressional intent is not clear, let Congress speak. Certainly with §8(c), Congress has an easy and streamlined way to let the Virgin Islands know that it doesn't like 24 V.I.C. §129(a).

CONCLUSION

The Third Circuit erred in finding 24 V.I.C. §129(a) to be violative of the Supremacy Clause. Section 129(a) is nothing more than execution of the federal statutes in complete line with Congressional intent. The U.S. Virgin Islands are small, and possess an economy totally based on tourism. Its economic fortunes literally fluctuate with the climate, social and physical. While it is unknown what exact percentage of the work force the alien workers now constitute, in the recent past it has been clsoe to half. (App. B, p. 17b). So the question of §129(a) is extremely important in that it involves the ability of the Virgin Islands government to deal precisely with fluctuations in its economy and the H-2 alien work force.

Since *Gannet* found 24 V.I.C. §129(a) to be proper in 1968, Congress has not annulled that statute. The Third Circuit now has, overruling both *Gannet* and the District Court. We think, also, that the Third Circuit ignored and misconstrued *De Canas.*

This Court alone must decide the issue presented by this case.

Respectfully submitted,

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APPENDIX A

Alfred ROGERS and Rupert Lespeare, Indivudally and on behalf of all other persons similarly situated, Plaintiffs,

v.

Jean D. LARSEN, Individually and as Acting Commissioner of Labor of the Virgin Islands of the United States, et al., Defendants.

Civ. No. 75/169.

District Court, Virgin Islands,
D. St. Thomas and St. John.

Feb. 20, 1976.

As Amended May 14, 1976.

MEMORANDUM OPINION

CHRISTIAN, Chief Judge.

This action was commenced on March 14, 1975, when Plaintiffs Alfred Rogers and Rupert Lespeare, nonimmigrant aliens present in the Virgin Islands pursuant to 8 U.S.C. §1101(a)(15)(H)(ii), filed suit for mandatory, declaratory and injunctive relief. Specifically, *inter alia*, they sought a declaration that 24 V.I.C., Chapter 6 and the amendments thereto–but primarily 24 V.I.C. §129, is unconstitutional as in conflict with the Fifth and Fourteenth Amendments to the United States Constitution, and contrary to the Revised Organic Act, 48 U.S.C. §1406g, as amended.

They also sought to enjoin the application of 24 V.I.C., Chapter 6 to themselves and others similarly situated and to mandate that the Defendants cease to enforce 24 V.I.C., Chapter 6 against them. Plaintiffs further sought a declaration that Provision 8 in Form 1-320B, the required agreement between employers and the Immigration and Naturalization Service for the hiring of nonimmigrant alien labor, is "null, void and unenforceable," and an injunction from enforcing Provision 8 against Plaintiffs. Finally, Plaintiffs sought to enjoin enforcement of 8 U.S.C. §1251 and the regulations thereunder, against them and others similarly situated.

On April 24, 1975, Defendant Jean Larsen, Acting Commissioner of Labor of the Virgin Islands, filed an answer denying, *inter alia*, that the above-mentioned statutes and provisions were unconstitutional as applied, or that Plaintiff Rogers had been terminated from employment pursuant to 24 V.I.C. §129.

On May 9, 1975, a hearing was held on Plaintiffs' motion for a preliminary injunction. No decision on the matter was rendered, since it was determined that an evidentiary hearing should be held. Such hearing was set for June 5, 1975. The Court also deferred decision on Plaintiffs' motion to certify the suit as a class action.

On May 23, 1975, Defendants, Attorney General of the United States, Commissioner of Immigration and Naturalization and Director of the Virgin Islands Alien Certification Office [hereinafter, the Federal Defendants], moved for an order dismissing the action as to them on the ground of lack of jurisdiction of the District Court "over any matters herein pertaining to the immigration laws, the only one in which they are involved." Basically, the Federal Defendants argued that

the Plaintiffs had yet to exhaust their administrative remedies, that certain decisions on the part of the immigration officials were discretionary and hence unappealable, and that the Court of Appeals, rather than the District Court, has jurisdiction over pending deportation proceedings.

Also on May 23, 1975, Defendant Jean Larsen filed a motion to dismiss the complaint for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the ground that Plaintiffs lacked standing to prosecute the cause. Defendant Larsen submitted affidavits with the motion tending to show that Plaintiffs were dismissed from their employment due to completion of their employer's "only major construction job and to a shortage of materials," and not to application of section 129. The affidavits further tended to show that Rogers' appeal from a decision of the Immigration and Naturalization Service granting him voluntary departure was presently pending, and that Lespeare's immigration status was secure since he had found another job and had been re-certified to remain in the territory.

On June 4, 1975, the United States Attorney filed a motion to quash a subpoena duces tecum which had been served upon Dante Rossi, officer in charge of the Immigration and Naturalization Service for the Virgin Islands and James St. John, Jr., Director of the Virgin Islands Alien Certification Office. Also on the same date, counsel for Plaintiffs submitted a motion to intervene on behalf of two nonimmigrant aliens, Casper Ephraim and Raphael Lockhart. The motion was supported by affidavits from each of these persons stating that they were fired from their jobs because

their employers had been told to do so by the Virgin Islands Department of Labor in order that they could be replaced by citizens or permanent residents.

On June 5, 1975, an evidentiary hearing was held to determine whether a preliminary injunction should issue. At that hearing, this Court denied the motion to quash submitted by the United States Attorney. The Court dropped Plaintiff Lespeare as a party because the testimony adduced at the hearing satisfied the Court that he had not been fired pursuant to any application of section 129. The Court took under advisement the question whether Plaintiff Rogers should be dropped as a party. The motion of Casper Ephraim to intervene as a party plaintiff was heard and denied. The motion of Rafhael Lockhart to intervene as a party plaintiff was heard and granted. The motion to dismiss the entire matter on the ground that Plaintiffs had no standing to sue was denied for the reason that Rafhael Lockhart was found to have standing.

After the hearing, this Court entered an order directing that Alfred Rogers be dropped as a party for the reason that he had not been terminated from his employment pursuant to section 129.

At this juncture, the initial question for determination is whether the case against the Federal Defendants should be dismissed. I conclude that the question must be answered in the affirmative for the following reason: The only Plaintiff remaining in this suit is Rafhael Lockhart. His affidavit, dated May 22, 1975, states that he was employed by Litwin Corporation on St. Croix until April 18, 1975. At that time, he was terminated

> for the reason that he is a non-resident worker as defined in Title 24, Chapter 6 of the Virgin Islands Code and as is more particularly stated in the letter of termination received from Litwin Corporation. . . .

Id. The letter to Lockhart from the Litwin Corporation, dated April 5, 1975, and signed by J. E. Rhorer, Project Superintendent, read as follows:

> Pursuant to Title 24, Chapter 6 of the Virgin Islands Labor Code, the Litwin Corporation is required to replace Non-Resident workers with qualified Resident Workers. We are hereby advising you that your position will be filled by a U.S. Citizen/Permanent Resident, and, in accordance with the Virgin Islands law, we are giving you fourteen (14) days notice of termination. Your last day of employment on this job will be April 18, 1975.

Neither Lockhart's affidavit nor any other material submitted to this Court presently alleges or otherwise demonstrates that, once Lockhart was dismissed, he became subject to deportation proceedings. His sole allegation is that he was dismissed from his job pursuant to section 129. This being the case, he has not stated a claim against any of the Federal Defendants, and, accordingly, the suit against them must be dismissed. In reaching this decision I need not consider the complex arguments raised in the brief submitted in support of the Federal Defendants' motion to dismiss. Indeed, this decision should not be considered as reflecting upon the merits of those arguments.

Presumably, in light of the foregoing, a second evidentiary hearing could be held to determine whether the allegations contained in the affidavit of Rafhael

Lockhart are true, and then, whether an injunction should issue. However, I have concluded that such a hearing would serve no purpose. Both sides have thoroughly briefed the legal issues pertaining to 24 V.I.C. §129, and I am ready to hold, as a matter of law: 1) that this statute is not unconstitutional on its face or as applied, and 2) that Provision 8 of Form I-320B is lawful. Therefore, even if Lockhart's allegations are true, he has stated no claim against the remaining Defendant Jean Larsen, and the complaint must be dismissed.

My reason for arriving at the above-stated conclusion is a simple one: the issue of the constitutionality of 24 V.I.C. §129 was already decided in *Gannet Corporation v. Stevens*, 282 F. Supp. 437 (D.V.I. 1968). The principal question before Judge Maris in that case was whether 24 V.I.C. §125 *et seq.* was

> invalid in that (1) Congress has fully legislated with respect to importing alien nonresident workers to the exclusion of territorial legislation such as this, and (2) that the statute fails to give equal protection of the laws and is discriminatory.

Id. at 440. These are precisely the major contentions raised in the complaint in the instant case.

Judge Maris reached the following conclusion concerning the preemption question:

> . . . the Act of 1964 and its amendments [24 V.I.C. §125 *et seq.*] . . . were designed to provide the procedure for the performance of the duty delegated to the United States Employment Service, and through it to its affiliate, the Virgin Islands Employment Service, to certify, with respect to nonimmigrants sought to be admitted pursuant to section 214 of the Immigration and

> Nationality Act of 1952, that unemployed persons capable of performing such services or labor cannot be found in the Virgin Islands and that such employment will not adversely affect the wages and working conditions of workers in the Virgin Islands similarly employed. Immigration Regulations, §214.2(h)(2)(ii), 8 CFR (Rev. Jan. 1, 1967) p. 43. The concurrent cooperation required of the Commissioner of Labor of the Virgin Islands is in furtherance of the carrying out of these policies and not in conflict with the federal law. For the Congressional policy is that American labor be protected and that temporary workers be admitted only when it tends to serve the national economy, the cultural interests, and the welfare of the United States, by facilitating the entry for temporary residence of aliens whose specialized experience or exceptional ability would best serve the American needs. Besterman, Commentary on the Immigration and Nationality Act, 8 U.S.C.A. pp. 42-43; H. Rept. 1365, 82nd Cong. 2d Sess., 2 U.S. Code Cong. & Admin. News, 1952, p. 1705. Therefore, the requirement that the Virgin Islands Commissioner of Labor makes a favorable recommendation on the importing employer's application is an additional safeguard that admission of such a nonimmigrant worker is in the public interest and that requirement is not in conflict or inconsistent with the controlling federal law. Furthermore, the certificate issued by the Virgin Islands Employment Service to the Immigration and Naturalization Service is merely a supporting document which the importing employer is required to file with his petition. Immigration Regulations, §214.2(h), 8 CFR (Rev. Jan. 1, 1967) pp. 42 *et seq.* If the Employment Service finds that a favorable certification cannot be made, or if the immigration authorities reject the petition, the federal law provides means of review quite

independent of the Virgin Islands legislation. See, for example, *Hess v. Esperdy*, D.C.N.Y. 1964, 234 F. Supp. 909.

Accordingly, we conclude that the Virgin Islands Act of February 25, 1964, No. 1102, 24 V.I.C. §125 *et seq.*, as amended, does not conflict with the Immigration and Nationality Act or the rules and regulations promulgated thereunder.

As for the equal protection question, Judge Maris stated:

> The Appellant next contends that the Act of February 25, 1964, as amended, is invalid in that it violates the equal protection clause of the Revised Organic Act, 48 U.S.C.A. §1561, and hence the orders issued thereunder are void. In this regard appellant's first argument is that the Act discriminates against a nonresident alien worker because he must be replaced when a resident worker becomes available. 24 V.I.C. §129. The short answer to this contention is that this is the Congressional mandate. A nonimmigrant may be admitted "temporarily to the United States to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country". 8 U.S.C.A. §1101(a)(15)(H)(ii). See *Government of the Virgin Islands v. Caneel Bay Plantation*, M.C.V.I. 1966, 5 V.I. 655. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. *Truax v. Raich*, 1915, 239 U.S. 33, 41, 36 S.Ct. 7, 60 L.Ed. 131. The condition under which a nonimmigrant is permitted to enter is that he may remain only temporarily, until the time when an unemployed resident worker capable of performing such services or labor becomes available. The rule expressed in *Truax v. Raich* that all residents,

> citizens and aliens alike must be given equal opportunity for employment, is inapplicable in the case of a nonimmigrant admitted solely for the purpose of temporarily performing services or labor.

Thus, the Court in *Gannet* was confronted with the precise question whether 24 V.I.C. §129 was constitutional, and squarely held that it was.

Since 1968, the year *Gannet* was decided, the Supreme Court has decided two new cases involving the rights of aliens: *Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973), and *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1970). Counsel for Plaintiffs has made much of the results reached in those cases, and asserts that the outcome in *Gannet*, in light of *Sugarman* and *Graham*, would be different were that case to be decided today. I am of the opinion, however, that *Sugarman* and *Graham* are merely extensions of earlier Supreme Court decisions, viz., *Takahasi v. Fish and Game Commission*, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948) and *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915), which were considered and rejected in *Gannet* as not controlling. All of these cases upheld the rights of aliens (parenthetically, resident aliens rather than nonimmigrants), by striking down discriminatory classifications based on alienage. (The District Court of the Virgin Islands has followed the lead of the Supreme Court in the area of aliens' rights. It has repeatedly refused to deny to all aliens, immigrant and nonimmigrant alike, public benefits, opportunities or services from which they were excluded simply on the basis of their status as aliens. *See Sailer v. Tonkin*, 356 F. Supp.

72 (D.V.I. 1973); *Williams v. Williams*, 328 F. Supp. 1380 (D.V.I. 1970); *Hosier v. Evans*, 314 F. Supp. 316 (D.V.I. 1970)). None of these cases concerned challenges to statutes based on the specific conditions of aliens' privilege to remain in the United States. None of these cases concerned challenges to state statutes echoing, supporting and implementing their federal models. I conclude that Sugarman and Graham do not call into question the viability of *Gannet*, which must be considered as controlling here.

Plaintiffs' counsel makes much of the fact that the Virgin Islands Employment Service [hereinafter, VIES] is no longer the "designated representative" of the United States Secretary of Labor. Counsel concludes from this fact that the post-*Gannet* decision to assign to the Manpower Administration the authority to deal with the certification of bonded aliens pursuant to 8 C.F.R. §214.2(3) indicates a recent Congressional intent to pre-empt the area, thereby making section 129 an impermissible encroachment on federal power. The distinction counsel attempts to draw–between section 129 when VIES was the designated representative and section 129 now that the Manpower Administration is the designated representative–is a "distinction without a difference". The determination to substitute the Manpower Administration for VIES was a decision of the Secretary of Labor, *i.e.*, an executive, discretionary determination. Manifestly, such a decision does not have the retroactive effect of altering Congressional intent or purpose with regard to the effectuation of its laws by a local body.

Counsel for Plaintiffs asserts that even if VIES had given some additional authority to assist the

Manpower Administration with regard to the admission of nonimmigrant alien labor, such authority would not constitute permission to enforce Title 24, Chapter 6. I certainly agree that the designated representative only has authority with regard to the original certification of nonimmigrant aliens, and the VIES, no longer the designated representative, cannot now be involved in the initial certification.

When *Gannet* was decided, however, VIES had worn two hats: it had not only served as the designated representative, it had aided in the enforcement of section 129 and the effectuation of 8 U.S.C. §1101(a)(15)(H)(ii). Simply because VIES has now been relieved of its direct duty to the United States Secretary of Labor with regard to initial certification of aliens does not mean that it cannot continue to perform its post-certification function pursuant to section 129–*i.e.*, to ensure that the legal condition of the nonimmigrant aliens' admission to the territory, namely "that unemployed persons capable of performing [the nonimmigrant alien's proposed job] cannot be found in this country", continues to exist. The *Gannet* decision found that such a function was permissible. I see no reason why this function should not also be deemed permissible today.

I seriously doubt that the Congress ever intended that, once an alien was granted entrance to the Virgin Islands on the ground that there was a need for his services and that no residents or citizens were able or willing to perform those services, such grant could never be reviewed or revoked upon a change in the economic situation. Indeed, for the purpose of §1101(a)(15)(H)(ii) to be adequately fulfilled, the labor

market must be constantly reexamined so that the needs of employers and citizens or residents may be constantly met–either with an ebb or a flow of nonimmigrant labor from or to this country. This continuing review of the labor situation is a function which VIES, pursuant to section 129, presently performs. Such a function cannot be considered an encroachment upon federal control of the area of nonimmigrant alien certification.

One additional comment to counsel's arguments seems appropriate here before closing.[1] Since this is a territory rather than a sovereign state, Congress need not turn to the court if it believes a local law encroaches upon its undisputed, supreme power with regard to immigration matters. Congress may simply, pursuant to section 8(c) of the Revised Organic Act of 1954, annul any territorial law it decides is impinging upon its authority. Since *Gannet* was decided, Congress has not taken any action that would in any way demonstrate its belief that 24 V.I.C., Chapter 6, trespasses upon its power. Indeed, the United States Attorney and officials of the immigration and Naturalization Service have stated to this Court that the local statute does not conflict with federal law. I consider these facts strong indication that section 129 passes constitutional muster.

For all the foregoing reasons, therefore, the request for preliminary injunction by the remaining Plaintiff must be denied, and the complaint dismissed for failure to state a claim upon which relief can be granted.

[1] Plaintiffs' argument concerning the "60-day Rule", *i.e.*, the policy of the Manpower Administration not to re-certify nonimmigrant aliens who have not found new employment within 60 days of dismissal from previous employment, does not merit textual consideration. The 60-day limitation period is a grace period which only benefits nonimmigrant aliens–who would otherwise be immediately deportable upon losing their jobs.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 76-1926

ALFRED ROGERS, and RUPERT LESPEARE Individually and on behalf of all other persons similarly situated,

vs.

JEAN D. LARSON, Individually and as the Acting Commissioner of Labor of the Virgin Islands of the United States, EDWARD H. LEVI, Individually and as Attorney General of the United States, LEONARD CHAPMAN, Jr., Individually, and as Immigration Commissioner of the United States, JAMES ST. JOHN, JR., Individually and as Director of the Alien Certification Office,

Alfred Rogers, Rupert Lespeare and Rafael Lockhart,

Appellants,

(D.C. Civil No. 75-169)

APPEAL FROM DISTRICT COURT OF THE VIRGIN ISLANDS, DIVISION OF ST. THOMAS

Argued April 26, 1977

Before WEIS, VAN DUSEN and GARTH,
Circuit Judges

Thomas A. Elliot, Esq., of
Legal Services of the Virgin Islands, Inc.,
Christiansted, St. Croix,
Attorney for Appellant Raphael Lockhart

Edgar D. Ross, Esq., Attorney General
of the Virgin Islands;
Roderick Lawrence, Esq., Assistant
Attorney General of the Virgin Islands;
Charlotte Amalie, St. Thomas,
Attorneys for Appellee Jean D. Larson

Philip Wilens, Chief, Government Regulatio
and Labor Section, Criminal Division;
James P. Morris, Esq. & George W. Masterton,
Esq., Attorneys;
U.S. Department of Justice, Wash., D.C. 20530
and
Julio A. Brady, Esq., United States
Attorney, St. Thomas
Attorneys for the United States of
America, Amicus Curiae

OPINION OF THE COURT
(Filed SEP 23, 1977)

VAN DUSEN, *Circuit Judge.*

This appeal raises the important question of whether 24 V.I.C. §129, which provides for the replacement of alien nonimmigrant workers in the Virgin Islands with United States citizens or permanent resident aliens,[1] is

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[1] 24 V.I.C. §129(a) provides in pertinent part:

"Replacement of nonresident employees with residents
"(a) If at any time subsequent to the employment of a nonresident worker pursuant to a clearance order by the Commissioner, upon notice to such effect by the Employment Service or upon his own investigation, shall ascertain that there is available an occupationally qualified resident worker to fill the position of such nonresident worker, or if at any time the Commissioner finds, after investigation and hearing, that the public interest and welfare demand such action, the Commissioner shall notify the employer in writing and thereupon the employer shall terminate the employment of the nonresident worker. In any case where more than one nonresident worker is employed in the Virgin Islands in a particular job classification for which qualified resident workers become available, the employer who has bonded and employed the last nonresident worker in the job classification shall, in his discretion, terminate the employment of any nonresident alien employed by him in such job classification, and so on until all available qualified resident workers in the particular job classification shall be employed; . . . ."

The remainder of the section provides in substance as follows:

(1) resident workers shall be discharged only for just cause and shall not be replaced by a non-resident worker unless so discharged (§129(b));

(2) a hearing shall be held before the Commissioner of Labor for the Virgin Islands for resident workers wrongfully discharged in violation of §129(b), *supra* (§129(c));

(continued)

(footnote continued from preceding page)

(3) the employer shall not shorten the workday or workweek of resident workers in order to hire nonresident workers (§129(d));

(4) layoffs are to affect nonresident workers before any resident worker may be laid off (§129(e));

(5) no nonresident worker may fill the position of a striking resident worker (§129(f)).

24 V.I.C. §125 contains the following pertinent definitions:

"'Nonresident worker' means any person who is capable of performing services or labor and who is a nonimmigrant alien admitted to the United States under the provisions of section 101(a)(15)(H)(ii), Immigration and Nationality Act (June 27, 1952, c. 477, §101(a)(15)(H)(ii); 66 Stat. 166(a)(15)(H)(ii); 8 U.S.C. §1101(a)(15)(H)(ii)), and under the provisions of related sections of such Act.

"'Resident worker' means any person who is capable of performing services or labor and who is a citizen of the United States or an immigrant alien admitted to the United States for permanent residence under the provisions of the Immigration and Nationality Act, as amended (June 27, 1952, c. 477, §101 et seq.; 66 Stat. 166 et seq.; 8 U.S.C. §1101 et seq.)."

On the facts asserted by Lockhart, the appellant, only §129(a) is before the court. In the district court, plaintiffs Lespeare and Rogers also asserted that §129(e) was unconstitutional. The district court found as a fact that neither Lespeare nor Rogers lost his employment through operation of 24 V.I.C. §129 and dismissed them from the action. Lespeare, Rogers and Lockhart filed a notice of appeal on April 20, 1976. After they had filed, the district court approved their motion for substitution of counsel. Substituted counsel filed no briefs in this court concerning the cases of Lespeare and Rogers. Therefore, these parties apparently have abandoned their appeal and their challenge to §129(e). Because of this abandonment, the 129(e) issue is not before this court.

The district court also dismissed the plaintiffs' suit against the United States and the Acting Commissioner of Labor of the Virgin Islands. Plaintiffs challenged the constitutionality of a

(continued)

(1) pre-empted under the Supremacy Clause, Art. VI, cl. 2, of the Constitution,[2] by the Immigration and Nationality Act (INA), 66 Stat. 163, as amended, 8 U.S.C. §§1101, *et seq.*, or (2) violative of the Equal Protection Clause of the Fourteenth Amendment as applied through section 3 of the Revised Organic Act of the Virgin Islands, 48 U.S.C. §1561, as amended.[3]

The district court denied a request for injunction against enforcement of the Virgin Islands statute and dismissed the complaint, finding neither pre-emption nor equal protection violations. *Rogers v. Larsen*, ____ V.I. ____, 411 F. Supp. 122 (D.V.I. 1976). Because we disagree as to pre-emption, the order of the district

(footnote continued from preceding page)

standardized agreement between the United States and employers which sets forth the conditions of the entry of alien nonimmigrant workers. They also sought to enjoin the enforcement of the provision of the Immigration and Nationality Act relating to deportation against them and all persons similarly situated. These issues also are not before us on appeal.

[2] This clause contains, *inter alia*, the following language:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . . ."

[3] 48 U.S.C. §1561 provides that no law shall be enacted in the Virgin Islands which shall deprive any person therein of equal protection of the laws and extends the equal protection clause to the Virgin Islands. *Cf. Chapman v. Gerard*, 456 F. 2d 577 (3d Cir. 1972) (Virgin Islands statute barring aliens from participating in territorial scholarship fund held invalid).

court will be reversed.[4] Under the view we take of this case, it is unnecessary to reach the issue of equal protection.

I.

Appellant Rafael Lockhart[5] was admitted to the Virgin Islands for temporary employment as a nonimmigrant alien under §101(a)(15)(H)(ii) of the INA, 8 U.S.C. §1101(a)(15)(H)(ii),[6] and the regulations promulgated thereunder (8 C.F.R. Ch. 1). Prior to his entry, a determination had been made in accordance with the regulations promulgated under the INA by, or in behalf of, the United States Department of Labor that local workers were not available for the positions which the temporary alien nonimmigrant workers would fill and that the employment of these workers, including Lockhart, would not adversely affect the wages and working conditions of the domestic workers similarly employed. See 8 C.F.R. §214.2(h)(3).[7] On April 5, 1975, pursuant to notice given by the Virgin Islands Commissioner of Labor under 24 V.I.C. §129(a), appellant Lockhart's employer, the Litwin Corporation, informed him by letter that his position was to be filled by a United States citizen or permanent resident alien as required by Virgin Islands law and that his employment would terminate in 14 days on April 18, 1975.

[4] We note that the district court based its decision in part on the fact that "the United States Attorney and officials of the Immigration and Naturalization Service have stated to this Court that the local statute does not conflict with federal law." ____ V.I. at ____, 411 F. Supp. at 128. As noted in note 9 below, the United States, through the Department of Justice, has taken a different position in this court. This change of position by the United States does not preclude us from addressing the issues raised by the Government under the general rule that we do not address on appeal issues not raised in the trial court, *United States v. Dansker*, 537 F.2d 40, 64 (3d Cir. 1976); *United States v. Moore*, 453 F.2d 601, 604 (3d Cir. 1974); because we deem this case to fall within the exception that allows that rule to be relaxed "whenever the public interest . . . so warrants." *Franki Foundation v. Alger-Rau Associates, Inc.*, 513 F.2d 581, 586 (3d Cir. 1975), and cases there cited.

[5] See note 1, *supra*, for explanation of Lockhart's substitution as appellant in this matter.

[6] This section establishes a class of nonimmigrant aliens defined as follows:

> "(H) an alien having a residence in a foreign country which he has no intention of abandoning . . . (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country. . . ."

[7] This section provides in pertinent part:

> "(3) *Petition for alien to perform temporary service or labor* – (i) *Labor certification.* Either a certification from the Secretary of Labor or his designated representative stating that qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed, or a notice that such a certification cannot be made, shall be attached to every nonimmigrant visa petition to accord an alien a classification under section 101(a)(15)(H)(ii) of the Act."

II.

The issue before us is whether 24 V.I.C. §129(a) is pre-empted by the INA and the relevant federal regulations. Although power to regulate immigration is unquestionably exclusively a federal power, regulation of immigration is not *per se* pre-empted by constitutional power. *De Canas v. Bica*, 424 U.S. 351, 354-55 (1976). When the statutes of a state or territory are challenged as void under the Supremacy Clause, "[n]o simple formula can capture the complexities of this determination; the conflicts which may develop between state and federal action are as varied as the fields to which congressional action may apply." *Goldstein v. California*, 412 U.S. 546, 561 (1973). The Supreme Court has, however, established three grounds upon which a local statute may be deemed pre-empted by federal law. It will be pre-empted (1) if "Congress has unmistakenly so ordained," or (2) if "the nature of the regulated subject matter permits no other conclusion" but pre-emption, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963); *De Canas v. Bica, supra* at 356; or (3) if it violates the Supremacy Clause by standing "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[8] *Hines v. Davidowitz*, 312 U.S. 52, 67

[8] As Chief Judge Seitz has noted, the touchstone of the second and third bases of pre-emption is also congressional intent to pre-empt. In these cases,

> "[T]his intent is inferred or presumed from the nature of the federal action rather than made explicit in the statute or legislative history. That a presumption as to Congressional intent is fundamental to preemption in cases where
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> *(continued)*

(1941); *Florida Lime & Avocado Growers, Inc. v. Paul, supra* at 141; *Goldstein v. California, supra* at 561; *De Canas v. Bica, supra* at 363. Our task, then, is to determine if 24 V.I.C. §129(a) is void because it is pre-empted by the INA under any one of these tests.

The meaning of the first test is clear, but before we apply the tests to the facts of this case, we articulate our understanding of the distinction between the second and third tests. We understand the second test to mean that the subject matter of the federal and local laws is such that the two laws or regulatory schemes must inherently either conflict or be duplicative. That is, under this test it is impossible for there to be local regulation in the subject area that does not conflict with or duplicate federal regulation.

The third test is applied when there is room in the subject area for both federal and local regulation. This test requires the court to examine both statutory schemes to determine if they can co-exist or if they conflict. *De Canas v. Bica, supra* at 363.

(footnote continued from preceding page)

> the nature of the subject matter is thought to require exclusive federal authority is evident from the opinion in *De Canas v. Bica, supra*: the Court said that Congressional 'intent' to preempt state authority could not be 'derived' from the comprehensiveness of the federal scheme involved, the Immigration and Nationality Act. 424 U.S. at 359. With respect to cases where it is alleged that specific state legislation 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' we again conclude that it must be reasonable to presume that Congress would have intended to preclude the state action in question."

Amalgamated Transit Union v. Byrne, No. 76-2050, slip op. at ____ (3d Cir. 9/22/77).

As to the first test, the answer seems clear. As the United States concedes in its amicus brief, nothing in the INA or its legislative history specifically precludes local regulation in this area.[9] Furthermore, appellee does not cite, nor can we find, any legislative history or language in the statute indicating that Congress unmistakably ordained that the INA pre-empts local regulation. Additionally, the Supreme Court has held that in enacting the INA, Congress did not ordain pre-emption of state regulation of the employment of aliens illegally in the country. *De Canas v. Bica, supra* at 356.

Regarding the second test, our view is that the nature of the subject matter does not preclude local regulation in this area. We reach this conclusion by relying on *Gannet Corporation v. Stevens*, 6 V.I. 309, 282 F. Supp. 437 (D.V.I. 1968), which illustrates how local

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[9]The amicus brief filed in this court on July 20, 1977, concludes with the following language:

> "In the difficult situation presented by the Nonimmigrant Labor Program on the Virgin Islands, we suggest that the proper course for this Court is to rule that the Virgin Islands statute is invalid on the basis of the statutory and regulatory provisions involved, despite the ways in which the unique development of the H-2 program has caused the federal administration of that program to deviate somewhat from the federal regulatory scheme. The situation should be left as the responsibility of the federal agencies involved, and, possibly, the Congress, in line with the recommendations in the 1975 Report, pp. 54-56 [1975 Comm. Print discussed *infra*]."

Brief for United States as Amicus Curiae at 32-33.

Although appellee was given ample opportunity to comment on this brief, it has not done so.

and federal law can co-exist in this area without duplication or conflict. There, Gannet Corporation appealed from an order by the Commissioner of Agriculture and Labor of the Government of the Virgin Islands, directing it to pay back wages to certain nonresident aliens pursuant to a statutory scheme requiring employers to pay a specified minimum wage to, and provide not less than forty hours of work per week for, nonresident alien workers who had been brought to the territory to supplement the labor force. Gannet argued that the statutes authorizing the Commission to take this action were pre-empted by federal law. Judge Maris thoroughly reviewed the provisions and purposes of both the INA and the challenged Virgin Islands statutory scheme and concluded that the Virgin Islands statutes were not inconsistent with federal law. *Gannet, supra*, 6 V.I. at 329-30, 282 F. Supp. at 447. Judge Maris' analysis of both statutes demonstrates that the INA leaves room for the states and territories to regulate some aspects of the conditions of employment for nonimmigrant aliens. Therefore, the nature of the subject matter in this case does not preclude local regulation.

This view also receives some support from *De Canas v. Bica, supra*. Although *De Canas* dealt with a state statute regulating the employment of aliens illegally in this country and the statute challenged in the present case regulates the employment of aliens legally in this country, *De Canas* nonetheless stands for the general proposition that the subject matter of employment of aliens is not one that permits no other conclusion but that Congress has pre-empted state regulation.

We reach the narrow question of whether §129(a) stands as an obstacle to the execution of the purposes of the INA. For reasons indicated below, we hold that it does.

At the outset, we note that neither *De Canas v. Bica, supra*, relied on by the appellee, nor *Gannet Corporation v. Stevens, supra*, relied upon by the district court, precludes a determination that §129(a) stands as an obstacle to execution of the purposes of INA. *De Canas* held that the challenged California statute was not pre-empted on the grounds already discussed, specific congressional ordination and a subject matter permitting no conclusion but pre-emption. The Court expressly reserved the question of whether the California statute was pre-empted because it stood as an obstacle to the accomplishment of the purposes of Congress, finding the record insufficient to address that injury. *De Canas v. Bica, supra* at 363. Furthermore, *De Canas* is distinguishable from the present case because, as noted above, *De Canas* concerned employment of aliens illegally in this country, and the statute challenged here concerns the employment of aliens lawfully in this country.

Although the language used by Judge Maris in *Gannet* differs somewhat from the language we use here, we read *Gannet* as holding that the Virgin Islands statutes requiring employers to pay back wages for violating Virgin Islands minimum wage and hour laws do not stand as an obstacle to the purposes of the INA. It does not follow from this that the statute requiring termination of an alien's employment does not stand as an obstacle to the purposes of the INA. As Judge Maris noted, in the context of pre-emption, "each case must

be decided on its own particular facts." *Gannet, supra*, 6 V.I. at 319, 282 F. Supp. at 441.

We now turn to an examination of the two statutory schemes. Both the INA and the Virgin Islands statutory provisions present a comprehensive scheme for regulating the employment of nonimmigrant alien workers. We agree with the analysis of those statutes presented by the United States in its amicus brief.

The federal statutory provision establishing a nonimmigrant class of aliens "coming temporarily to the United States to perform . . . temporary services or labor" contains only one restriction: they may come to this country only if unemployed persons capable of performing such services cannot be found here. The provision is silent as to any controls to which these aliens will be subject after they arrive in this country. Section 214 of the INA, 8 U.S.C. §1184, subsection (a), provides, however, that the admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe. Additionally, subsection (c) of that section sets forth a special petition procedure for the class of nonimmigrants described in 8 U.S.C. §1101(a)(15)(H). It states, in part, that the question of importing any nonimmigrant under the "H" provisions in any specific case or specific cases shall be determined by the Attorney General after consultation with appropriate agencies of the Government, upon petition of the importing employer. The petition is to be in such form and contain such information as the Attorney General shall prescribe. Thus, the Attorney General has broad authority over the circumstances and conditions under which the alien temporary workers

may come to this country and under which their stay in this country is governed. Therefore, the regulations of the Immigration and Naturalization Service have particular importance here in determining the pre-emption question.

Part 214 of Title 8, Code of Federal Regulations, contains the Service's regulations for nonimmigrants. Under those regulations, an alien defined in 8 U.S.C. §1101(a)(15)(H)(ii) must be the beneficiary of an approved visa petition filed on Form I-129B, which gives such alien H-2 status. The petitioner for one seeking H-2 status would be the employer. If an alien in the United States desires to perform temporary services for another petitioner, a new petition on Form I-129B must be submitted, and, if the petition is approved, an extension of stay may be granted without requiring the submission of an application for an extension (Form I-539). 8 C.F.R. 214.2(h)(1).

An H-2 petition must be accompanied by either a certification by the Secretary of Labor, stating that qualified persons in the United States are not available and that the employment of the beneficiary will not affect the wages and working conditions of workers in the United States similarly employed, or a notice that such certification cannot be made. If a labor certification is refused, the petitioner may present countervailing evidence that qualified persons in the United States are not available and that the employment policies of the Department of Labor have been observed. Such evidence will be considered in the adjudication of the petition. 8 C.F.R. 214.2(h)(3)(i). A statement shall be furnished with the petition describing in detail why it is necessary to bring the alien to the United States and

whether the need is temporary, seasonal or permanent. 8 C.F.R. 214.2(h)(3)(iii).

The petitioner is notified of the decision and, if the petition is denied, of the reasons for denial and of his right to appeal. 8 C.F.R. 214.2(h)(6). An approved petition is valid for not more than one year from the date of its approval, if a labor certification is not required. If a labor certification has been attached to an H-2 petition, the approval of the petition is not valid beyond the validity of the certification. When the certification does not have an expiration date, the petition's approval cannot exceed one year from the date on which the certification was issued. 8 C.F.R. 214.2(h)(7).

A beneficiary may apply for admission to this country while the petition is valid or during the period of an extension of his temporary stay. The authorized period of the beneficiary's admission is governed by the period of established need for his temporary services but cannot exceed the date of the petition's validity or the date until which his temporary stay had been previously authorized by the Service. 8 C.F.R. 214.2(h)(9). An extension of stay may be authorized in increments of not more than 12 months each under the same terms and conditions that apply to an admission, except that an applicant for an individual extension is not required to file a new petition to continue previously authorized employment. A new petition is required on behalf of an applicant who seeks to pursue employment or training other than that previously authorized, and, if he is maintaining status, he may be granted an extension of stay for the period of the approved petition's validity without an application

therefor on Form I-539. An H-2 alien's application for extension must be accompanied by a labor certification or a notice that such certification cannot be made. In any event, an H-2 cannot be granted an extension which would result in an unbroken stay in the United States for more than three years. 8 C.F.R. 214.2(h)(11). Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status within the meaning of §241(a)(9) of the Act, 8 U.S.C. §1251(a)(9), see also 8 C.F.R. 214.1(c), and may result in deportation.

These regulations along with the broadly-worded statutory provisions provide a comprehensive and detailed federal scheme governing an H-2's admission to this country and his stay while here. They carry out the Attorney General's complete responsibility, granted by the statute, over the petition process for importing temporary labor and over matters relating to the length of time and the conditions under which the workers may remain in this country. As noted, the United States Department of Labor also plays a role in this process through the issuance of labor certifications. 8 C.F.R. 214.2(h)(3).

In determining if this statutory scheme conflicts with Virgin Islands law, it is helpful to examine its application to the particular circumstances of the Virgin Islands. This topic has been the subject of thorough scrutiny in a special congressional study, Subcommittee on Immigration, Citizenship and International Law of the House Committee on the Judiciary, 94th Cong., 1st Sess., Nonimmigrant Alien Labor Program on the Virgin Islands of the United States (Comm. Print 1975) [hereinafter cited as 1975 Comm. Print].

Prior to the enactment of the INA, the controls over the nonimmigrant alien workers who had been admitted to the Virgin Islands under special circumstances, as well as over aliens working illegally, were slight. See 1975 Comm. Print 3-4, and Appendix, 1, 57-59. In the early years after the INA became effective, the Immigration Service construed the H-2 provisions as requiring that the employment be very temporary. The hotal and agricultural jobs were considered to be recurring and seasonal in nature and they were not included within the interpretation. Employers in those fields, who had previously relied heavily on nonresident alien workers, began to complain of shortages of help. *Id.* at 7-11.

In 1954 a special House subcommittee held hearings and studied this problem. Concluding that the Service's interpretation of the word "temporary" was too restrictive, the subcommittee recommended a more realistic and expeditious application of the H-2 provisions for natives of the island of Tortola in the British Virgin Islands. This application of H-2 subsequently was expanded to other Caribbean Islands and other occupations were brought within the expanded construction of the INA. *Id.* at 14-15. During the 1960s, the alien labor program expanded to the point where, by the end of the decade, alien workers constituted roughly half of the Virgin Islands labor force, and temporary alien workers were economically essential to the Virgin Islands. *Id.* at 15-16.

The increase in alien workers is attributable to several factors. Much of the native population apparently is unwilling to accept agricultural, domestic labor and tourist industry jobs, considering them degrading. *Id.* at

15. Secondly, the Immigration and Naturalization Service has exempted aliens from nearby islands from the statutory requirement of presenting a visa. 8 C.F.R. 212.1(b). Third, throughout most of the alien labor program, the Virgin Islands Employment Service (later the Virgin Islands Security Agency), which is an affiliate of the United States Department of Labor, issued labor certifications required for the importation of temporary workers, but received little supervision from Washington. *Id.* at 17-20, 22-26. Finally, workers were allowed to bring their spouses and minor children to the Islands with them, at first as nonimmigrant visitors and later as H-4 nonimmigrants after the enactment of Public Law 91-225, 84 Stat. 116, 8 U.S.C. §1101(H)(iii), which specifies that the spouse and children of the H-2 may accompany him. 1975 Comm. Print at 31-33.

The Virgin Islands statutory provisions in question here also present a comprehensive scheme for regulating the employment of nonimmigrant workers. Title 24, Chap. 6, of the Virgin Islands Code, §§125 *et seq.*, entitled Protection of Resident Workers and added by the Act of February 25, 1964, was designed to protect a wide range of interests of persons in the domestic labor market from the competition of nonresident aliens. Section 125 defines the term "nonresident worker" as any person capable of performing services or labor who is a nonimmigrant admitted to the United States under the provisions of 8 U.S.C. §1101(a)(15)(H)(ii) and related statutory provisions. That section also defines the term "resident worker" as any person capable of performing services or labor who is a citizen of the United States or an alien lawfully admitted for

permanent residence under the provisions of the INA, as amended. The statute also provides that resident workers are to be given preference in employment wherever possible, and nonresident workers are to be employed only to supplement the labor force of available and qualified resident workers. Section 126. No employer is to employ a nonresident worker except in strict accordance with the provisions of the chapter and regulations issued thereunder.

Section 127 sets forth the duties of the Employment Service and the Commission of Labor. These duties are prescribed, however, "without limitation on the scope or extent of powers, duties or responsibilities vested by other provisions of this chapter or of any other federal or territorial law and/or regulation." The statute also contains a number of provisions relating to the recruitment of temporary alien workers and the clearance orders for filling the positions. Section 128. Subsection (d) of §128 requires that, before submission of a clearance order to the Immigration and Naturalization Service, a written agreement from the employer must be submitted to the Commissioner of Labor in a prescribed form covering the need of having the workers for immediate employment, compliance with minimum recruitment wages and employment conditions, and workweek guarantees. It also provides that the Virgin Islands Employment Service shall notify the Commissioner, as well as the Immigration Service, whenever a qualified resident worker becomes available for a position occupied by an H-2. This notice is no doubt required because of the provisions of §129, the one particularly involved here.

Section 129(a) provides that the Commissioner of Labor shall give written notice to the employer whenever he ascertains that there is an occupationally qualified resident worker available to fill the position of a nonresident worker, following which the employer must terminate the employment of the nonresident worker. The Commissioner may give a similar notice if he determines, after investigation and hearing, that the public interest and welfare, demand such action. If a resident worker who has replaced a nonresident through this process is subsequently discharged, he may not be replaced by a nonresident, unless the resident was discharged on certain specified grounds and there is no other resident available. Subsection (b). Moreover, if a resident worker believes he was wrongfully discharged in violation of the section's provisions, he may file a complaint with the Commissioner and, if the Commissioner finds in the resident worker's favor, he will order his reinstatement. Subsection (c). Section 129(e) provides that no resident worker shall be laid off while a nonresident worker is retained in the same occupational classification for which the resident worker is qualified and available.

The Commissioner has a duty to investigate all complaints of violations of the provisions of §129 and, after notice and hearing, issue an order disposing of the matter. He may petition any court of competent jurisdiction of the Virgin Islands for the enforcement of such an order. Section 132. In addition, an employer who wilfully violates the chapter's provisions, or any rules or regulations issued pursuant thereto, shall be guilty of a misdemeanor. Section 135.

The statute also provides that the Employment Service, in cooperation with the Commissioner, shall conduct continuing surveys and recommend other measures for alleviating shortages and reducing the need for nonresident workers. Section 127(b). Although this provision is broad enough to encompass programs to improve the quality of the local labor market and other measures which would in no way conflict with the immigration procedures, it also aids the effectiveness of §129 in terminating the employment of a nonresident prior to the expiration of his authorized stay here under the Immigration and Nationality Act.

This examination of these two statutory schemes of Congress (amplified by regulations in 8 C.F.R. Ch. 1) and the Virgin Islands legislature shows that, although they share some common purposes, they are in direct conflict in the present case. The common purposes are to assure an adequate labor force on the one hand and to protect the jobs of citizens on the other.[10] Any statutory scheme with these two purposes must inevitably strike a balance between the two goals. Clearly, citizen-workers would best be protected and assured high wages if no aliens were allowed to enter.

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[10] As Judge Maris has stated:

> "[T]he Congressional policy is that American labor be protected and that temporary workers be admitted only when it tends to serve the national economy, the cultural interests, and the welfare of the United States, by facilitating the entry for temporary residence of aliens whose specialized experience or exceptional ability would best serve the American needs."

Gannet Corporation v. Stevens, supra, 6 V.I. at 327, 282 F. Supp. at 445.

Conversely, elimination of all restrictions upon entry would most effectively provide employers with an ample labor force. The conflict arises because the Virgin Islands and the United States strike the balance between these two goals differently.

The provision for termination of an alien's employment and stay at issue in this case illustrates this. The federal provisions imply that one of the considerations behind the federal regulations is continuity of the work force. Therefore, an employer can expect that an alien-worker's stay will not be terminated under federal law until the date specified on the Labor Department's certification or, if the certification does not specify a date, for a period of one year. In addition to providing employers a reasonable expectation that there will not be frequent and disruptive turnovers in his [sic] work force due to Government action, the federal regulations provide aliens with an incentive to come to the United States; they know they will be able to work until the expiration of the certificate or for a period of at least one year.

By comparison, the Virgin Islands statute strikes the balance more in the direction of protection of citizen-workers, for under the Virgin Islands statute an employer may be ordered to terminate the employment of an alien at any time if the Virgin Islands Commissioner of Labor determines that a qualified resident worker is available or if he determines that such termination is in the public interest. Thus, under the territory's scheme, the employer and the alien have no assurance as to the duration of employment. The Government of the Virgin Islands thereby may shorten the period of stay granted to an alien worker by the

United States by causing him to fail to comply with a condition of his stay under federal law: continued employment. Because of the different emphasis the two statutory schemes place on the purposes of job protection and an adequate labor force, we conclude that §129(a) stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the INA and is, therefore, invalid under the Supremacy Clause of the United States Constitution,[11] being in conflict with the INA.

In *De Canas v. Bica, supra*, the Court said:

> "Of course, state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress:
>
> " 'The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. See *Hines v. Davidowitz*, 312 U.S. 52, 66. Under the Constitution the states are granted no such powers; *they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence* of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of *aliens lawfully within* the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.' *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) (emphasis supplied)."

[11] See note 2 above.

Accordingly, the judgment of the district court will be reversed and the case remanded for action consistent with this opinion.

TO THE CLERK:
Please file the foregoing opinion.

Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1926

ALFRED ROGERS and RUPERT LESPEARE, Individually and on behalf of all other persons similarly situated

vs.

JEAN D. LARSON, Individually and as the Acting Commissioner of Labor of the Virgin Islands of the United States, EDWARD H. LEVI, Individually and as Attorney General of the United States, LEONARD CHAPMAN, JR., Individually, and as Immigration Commissioner of the United States, JAMES ST. JOHN, JR., Individually and as Director of the Alien Certification Office,

Alfred Rogers, Rupert Lespeare and Rafael Lockhart,

Appellants

(D.C. Civil Action No. 75-169)

ON APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS, DIVISION OF ST. THOMAS AND ST. JOHN

Present: WEIS, VAN DUSEN and GARTH, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Thomas and St. John and was argued by counsel on April 26, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, entered February 20, 1976, and April 27, 1976, be, and the same are hereby reversed and the cause remanded for action consistent with the opinion of this Court.

ATTEST:

/s/M. Elizabeth Ferguson
Chief Deputy Clerk

September 23, 1977

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 76-1926

ALFRED ROGERS, and RUPERT LESPEARE Individually and on behalf of all other persons similarly situated

vs.

JEAN D. LARSON, Individually and as the Acting Commissioner of Labor of the Virgin Islands of the United States, EDWARD H. LEVI, Individually and as Attorney General of the United States, LEONARD CHAPMAN, JR., Individually and as Immigration Commissioner of the United States, JAMES ST. JOHN JR., Individually and as Director of the Alien Certification Office,

Alfred Rogers, Rupert Lespeare, and Rafael Lockhart,

Appellants

(D.C. Civil No. 75-169)

APPEAL FROM DISTRICT COURT OF
THE VIRGIN ISLANDS DIVISION
OF ST. THOMAS

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

THOMAS M. UTTERBACK
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Attorney for Appellee
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(809) 774-1163

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 76-1926

ALFRED ROGERS, and RUPERT LESPEARE Individually and on behalf of all other persons similarly situated	)	
vs.	)	APPEAL FROM DISTRICT COURT
JEAN D. LARSON, Individually and as the Acting Commissioner of Labor of the Virgin Islands of the United States, EDWARD H. LEVI, Individually and as Attorney General of the United States, LEONARD CHAPMAN, JR., Individually and as Immigration Commissioner of the United States, JAMES ST. JOHN JR., Individually and as Director of the Alien Certification Office,	)	OF THE VIRGIN ISLANDS DIVISION OF ST. THOMAS
Alfred Rogers, Rupert Lespeare, and Rafael Lockhart, *Appellants* (D.C. Civil No. 75-169)	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Jean D. Larson, Commissioner of Labor of the Virgin Islands of the United States, Appellee abovenamed, by and through his attorney, hereby appeals to the Supreme Court of the United States from the Opinion and Judgment reversing the judgment of the District Court of the Virgin Islands, Division of St. Thomas and St. John, entered in this action on September 23, 1977.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

EDGAR D. ROSS
Attorney General

/s/
THOMAS M. UTTERBACK
Assistant Attorney General
Dept. of Law - Box 280
St. Thomas, V.I. 00801
Attorney for Appellee

Dated: December 15, 1977

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 1977, three copies of the Notice of Appeal to the Supreme Court of the United States were mailed, postage prepaid to Thomas A. Elliot, Esq., of Legal Services of the Virgin Islands, Inc., Christiansted, St. Crois, Attorney for Appellant raphael Lockhart and to Philip Wilens, Chief, Government Regulation and Labor Section, Criminal Division; James P. Morris, Esq., & George W. Masterton, Esq., Attorneys; U.S. Department of Justice; and Julio A. Brady, Esq., United States Attorney, St. Thomas, Attorneys for the United States of America, Amicus Curiae.

THOMAS M. UTTERBACK
Assistant Attorney General
Attorney for Appellee

APPENDIX D

24 V.I.C. §129. Replacement of nonresident employees with residents

(a) If at any time subsequent to the employment of a nonresident worker pursuant to a clearance order the Commissioner, upon notice to such effect by the Employment Service or upon his own investigation, shall ascertain that there is available an occupationally qualified resident worker to fill the position of such nonresident worker, or if at any time the Commissioner finds, after investigation and hearing, that the public interest and welfare demand such action, the Commissioner shall notify the employer in writing and thereupon the employer shall terminate the employment of the nonresident worker. In any case where more than one nonresident worker is employed in the Virgin Islands in a particular job classification for which qualified resident workers become available, the employer who has bonded and employed the last nonresident worker in the job classification shall, in his discretion, terminate the employment of any nonresident alien employed by him in such job classification, and so on until all available qualified resident workers in the particular job classification shall be employed; Provided, however, That for the purpose of this provision the words "bonded and employed" shall be interpreted to mean the initial and original bonding and employing of nonresident worker by an employer; And provided further, That this provision shall not be interpreted to authorize the violation by an employer of any seniority rights under any outstanding bona

fide labor union contract as determined by the Commissioner.

(b) A resident worker who has replaced a nonresident worker pursuant to the provisions of this chapter and whose services are contracted for without a definite term may not be discharged except for incompetence, insubordination, misconduct, violation of employers' rules and regulations or other just cause and shall not be replaced by the same or by any other nonresident worker unless so discharged and no other resident worker with the required skills is available.

(c) Any discharged resident worker, who is aggrieved and believes his dismissal was without just cause, may file a complaint with the Commissioner within 2 working days following such dismissal, who shall cause an investigation to be made within a like period of the filing of such complaint. If upon investigation the Commissioner determines that a prima facie case of wrongful dismissal exists, he shall hold a hearing at which the employer and employee may introduce evidence to establish the facts. If it is the Commissioner's determination that the worker was discharged in violation of the provisions set forth in this section, then the Commissioner shall order the reinstatement. of the worker, and the employer shall be ordered to pay the employee back pay from the date of dismissal to the date of reinstatement. The hearing and determination of the Commissioner shall be concluded not later than 9 working days after the date of filing of the complaint.

(d) No employer shall reduce the regular workday or workweek of resident workers for the purpose of giving employment to nonresident workers.

APPENDIX E

Article VI cl. 2 of the United States Constitution provides:

ARTICLE VI.–DEBTS VALIDATED, SUPREME LAW OF LAND

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX F

Section 101(a), Immigration and Nationality Act, 8 U.S.C. §1101(a), provides, in part:

As used in this Act –

* * *

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens –

* * *

(H) an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability; or (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country; or (iii) who is coming temporarily to the United States as a trainee; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him.

* * *

Section 214(a) of the Act, 8 U.S.C. §1184(a) provides, in part:

(a) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States.